No. _____

IN THE

Supreme Court of the United States

PATRICIA GROSSMAN,

PETITIONER,

V.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152;

DAVID LASSNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF HAWAII; AND

CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF HAWAII,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a union can trap a public worker into paying dues without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

2) Whether a union can moot a claim that it has violated *Janus*' affirmative consent requirements by establishing opt-out windows too short to reach appellate review.

PARTIES TO THE PROCEEDING

Petitioner, Patricia Grossman, is a natural person and citizen of the State of Hawaii.

Respondent David Lassner is a natural person and the President of the University of Hawaii. Respondent Clare E. Connors is a natural person and the Attorney General of Hawaii.

Respondent Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO is a labor union representing public employees in the State of Hawaii.

RULE 29.6 STATEMENT

As Petitioner is a natural person, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Grossman v HGEA,* No. 20-15356, United States Court of Appeals for the Ninth Circuit. Judgment entered July 29, 2021.
- *Grossman v HGEA,* No. 1:18-cv-00493-DKW-RT, United States District Court for the District of Hawaii. Judgment entered January 31, 2020.

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INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Petitioner, Patricia Grossman ("Grossman"), notified her employer, the University of Hawaii (the "University") that it did not have her consent to deduct union dues from her paycheck. For months afterward, the University and the Hawaii Government Employees Association ("HGEA" or the "Union") worked jointly to continue to deduct union dues from Grossman without her consent, limiting the exercise of her First Amendment rights to an arbitrary annual window of the Union's choosing.

The District Court ruled that because Grossman's withdrawal window occurred during the pendency of this litigation, her claim was now moot. It further ruled that Grossman had no right to a return of the dues taken by the Union, despite the fact that she had never provided HGEA the affirmative consent to dues deductions that *Janus* requires. On appeal in the Ninth Circuit, Grossman conceded that the Ninth Circuit's opinion in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), decided during the pendency of her appeal, foreclosed her claims, but she argued that *Belgau* was in error and should be overruled. The Ninth Circuit followed *Belgau* and ruled that the Union agreement Grossman signed was sufficient to waive her rights under *Janus*, even though that agreement included no such waiver.

1) Government employees like Grossman have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to

do so. *Janus*, 138 S. Ct. at 2486. This Court in *Janus* required such affirmative consent to be "freely given" through a "waiver" of First Amendment rights that must be shown by "clear and compelling" evidence. *Id*. This Court also requires that a "waiver" of a constitutional right must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). When she signed a union membership agreement prior to the *Janus* decision, Grossman could not have knowingly waived a right that this Court had not yet recognized. She signed her agreement in 1995. *Janus* was decided in June 2018. In July 2018, Grossman explicitly told her employer that it did not have her affirmative consent to withhold union dues. Trapping Grossman in the union until an annual escape period and continuing to deduct union dues violated Grossman's rights to Free Speech and Freedom of Association under *Janus*.

2) Grossman's claim for prospective relief is not moot because she has a live damages claim; therefore, she has a right to receive a declaration that the statute was unconstitutional as applied to her. In January 2019, during the pendency of the lawsuit, the Union attempted to moot this case by claiming it had lost her resignation, and it sent her a check for a partial reimbursement of the dues she was seeking, but Grossman rejected and returned even this partial payment and attempt to moot the case. Because the constitutional violation at issue in this case is a two-week escape window that occurs every year, allowing Unions to moot a case in this manner would permit the Union and the state to constantly evade review of their unconstitutional actions.

This Court should grant this Petition to resolve whether unions can avoid *Janus* claims by setting annual windows that are too short to allow appellate review, and to answer the important question as to whether *Janus* means what it said: that unions cannot fund their political speech by taking money from nonconsenting employees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Grossman v. Haw. Gov't Emples. Ass'n, AFSCME Local 152*, 854 F. App'x 911 (9th Cir. 2021) and reproduced at App. 1.

The opinion of the United States District Court for the District of Hawaii is reported at *Grossman v. Haw. Gov't Emples. Ass'n/AFSCME*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866 (D. Haw. Jan. 31, 2020) and reproduced at App. 4.

JURISDICTION

The Ninth Circuit issued its decision and judgment on July 29, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Patricia Grossman is an employee of the University of Hawaii at the Hilo campus. App. 4. At all times relevant to this appeal, she has been represented in that employment by HGEA, the union certified as the exclusive representative of her bargaining unit, pursuant to Haw. Rev. Stat. §§ 89-7 and 89-8(a). App. 7. Prior to June 2018, that employment was subject to a binary choice: employees who were members of Grossman's bargaining unit were required to either 1) join HGEA as union members or 2) pay an agency fee (sometimes called a "fair share" fee) to the union in lieu of membership. *Id*. Faced with this false choice, by which she would have had to pay the Union either way, Grossman became a member of the Union, signing a membership agreement in 1995. *Id*. At the time, her

membership agreement simply said, "[M]embership will continue . . . until [the employee] submit[s] written resignation of membership." *Id.*

On June 27, 2018, the Supreme Court issued its decision in *Janus,* holding that the binary choice to which Grossman had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. In emails sent July 7 and 10, 2018 to HGEA, Grossman asked the Union to confirm she was not a member because by 2018, she no longer recalled signing her 1995 authorization. Therefore, she expected that the deductions from her paycheck would stop due to *Janus*. App. 8. HGEA explained that according to its records she had joined in 1995. HGEA further explained that, pursuant to the recently enacted Hawaii Act 7 (codified at Haw. Rev. Stat. § 89-4), she could not revoke her membership authorization until a 30-day period in May and June the following year. *Id.* at 9. Grossman notified her employer on July 13, 2018 that she wished to withdraw her membership authorization and end the dues deduction. *Id.* at 10. But her attempt to assert her First Amendment right was denied. *Id*.

Therefore, Grossman filed this case in the District Court of Hawaii on December 20, 2018. App. 10. She seeks relief against the Union, Lassner, and Hawaii Attorney General Clare E. Connors ("Connors"), in her official capacity as the public official responsible for enforcement of the challenged Hawaii statutes. The Complaint included two counts: Count I challenged the refusal to allow Grossman to withdraw from the Union and the deduction of dues from her paycheck without her affirmative consent. Count II challenged the Union's status as exclusive representative for bargaining purposes.

After the filing of this suit, the Union switched positions and informed Grossman in January 2019 that it would disregard the window requirement of Hawaii Act 7, process her resignation, and stop taking further dues from her. App. 10-11. The Union also sent Grossman a check equivalent to the dues collected from her from July 2018 to January 2019. *Id.* at 13. While Grossman in her Complaint had pled a claim for the return of all dues, at least back to the statute of limitations, Grossman was never offered a refund of any dues taken prior to June 2018.

Once the case reached court, Respondents contended the failure to grant Grossman's request prior to the filing of this lawsuit was simply an administrative error. They speciously claimed that they had long before determined that Hawaii Act 7 did not apply to employees who signed membership applications prior to *Janus*, like Grossman. *Id.* at 11-12. But the email HGEA sent Grossman denying her withdrawal from the Union was clear that the denial was because of Act 7, explaining that "recent legislation . . . (Act 007) designat[es] a 'window' . . . [and] you'd be subject to this window". App. 9. Grossman maintains that this sudden change of heart is nothing but post-hoc gamesmanship by Respondents to avoid scrutiny of their unconstitutional policies. *Id.* at 12.

HGEA filed a motion to Dismiss Count II of the First Amended Complaint, which challenged the Union's status as exclusive representative. The District Court granted that motion and dismissed Count II on May 21, 2019. *See Grossman v. Haw. Gov't Emp. Ass'n*,

382 F. Supp. 3d 1088 (D. Haw. 2019).[1] In October 2019, the parties filed cross Motions for Summary Judgment on Count I. On January 31, 2020, the District Court issued its Opinion and its Judgment, denying Grossman's motion and granting the motions of the Defendants. App. 35-36.

Grossman timely appealed, but on April 13, 2020 the case was stayed pending the outcome of another case raising similar claims, *Belgau v. Inslee*, No. 19-35137. On September 16, 2020, the Court of Appeals issued its decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). The Ninth Circuit in *Belgau* held that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted" pursuant to a dues deduction authorization. *Id.* at 19, 20. On October 26, 2020, the Circuit Court denied *en banc* reconsideration in *Belgau*. *See Belgau*, No. 19-35137 at Dkt. 84 (9th Cir. Oct. 26, 2020). The stay in this case was lifted on September 21, 2020.

On November 6, 2020, Grossman filed a Motion for Summary Affirmance in light of *Belgau* and another recent opinion of the Ninth Circuit, *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019). *See* Dkt. 16. Grossman conceded in her Motion that *Belgau* controlled the outcome of her case. Therefore, she asked that the Ninth Circuit summarily affirm the opinion below. The Respondents opposed Grossman's motion, which was denied.

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[1] Grossman has declined to seek certiorari on this issue; therefore, it is not relevant to the Court's consideration of this Petition.

The parties proceeded to brief the case, with Grossman conceding that *Belgau* controlled but arguing it was in error and should be overruled. On July 29, 2021, the Ninth Circuit issued an opinion affirming the District Court, based on Grossman's admission. App. 3.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to address key legal questions as to the application of *Janus* to numerous cases pending in courts around the county.

This Court's "decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* was a gamechanger in the world of unions and public employment." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). It has, unsurprisingly, led to a significant amount of litigation around the nation, in almost every state and circuit where agency fees had previously been allowed. As of this filing, Petitioner is aware of at least four other petitions currently pending with this Court raising the same fundamental of question. *See Bennett v. AFSCME Council 31* (No. 20-1603); *Hendrickson v. AFSCME Council 18* (No. 20-1606); *Fischer v. Murphy* (No. 20-1751); *Troesch v. CTU* (No. 20-1786). Petitioner is also aware of another petition involving similar claims set to be filed the same day as her own. *See Wolf v. UPTE*, No. _____ (9th Cir. No. 20-17333). And more are coming. In the Ninth Circuit alone, Petitioner is aware of 15 cases that raise the

same or similar issues.[2] Certiorari petitions for several of these cases will be filed with this Court in the coming days. Around the country, the story is much the same.[3]

Despite this Court's teaching, the courts below have almost universally been hostile to the rights recognized in *Janus*. As exemplified by this case and the

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[2] *See Few v. United Teachers of Los Angeles,* No. 20-55338*; O'Callaghan v. Teamster Local 2010,* No. 19-56271; *McCollum v. NEA-Alaska*, No. 19-35299; *Hough v. SEIU Local 521,* No. 19-15792*; Babb v. California Teachers Ass'n,* No. 19-55692; *Wilford v. NEA, AFT, and CTA, CFT, et al.,* No. 19-55712*; Smith v. Superior Court, County of Contra Costa,* No. 19-16381*; Martin v. California Teachers Association,* No. 19-55761*; Imhoff v. California Teachers Association,* No. 19-55868*; Cooley v. California Statewide Law Enforcement Ass'n,* No. 19-16498*; Allen v. Santa Clara County Correctional,* No. 19-17217; *Hamidi v. SEIU,* No. 19-17442*; Anderson v. SEIU Local 503,* No. 19-35871*; Cook v. Brown,* No. 19-35191; *Carey v. Inslee*, No. 19-35290.

[3] *See, e.g., Pellegrino v. New York State United Teachers*, No. 18CV3439NGGRML, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); *Adams v. Teamsters Union Local 429*, No. 1:19-CV-336, 2020 WL 1558210 (M.D. Pa. Mar. 31, 2020); *Lutter v. JNESO et al*, No. 1:19-cv-13478 (D. N.J. 2020); *Zeigler v. AFSCME Council 13, et al.*, No. 2:20-cv-00996 (W.D. Pa); *Baro v. AFT*, No. 1:20-cv02126 (N.D. Ill.); *Mandel v. SEIU Local 73*, No. 1:18-cv-08385 (N.D. Ill.); *Nance v. SEIU*, No. 1:20-cv-03004 (N.D. Ill. 2020); *Troesch v. CTU*, No. 1:20-cv-02682 (N.D. Ill.); *Hoekman v. Ed. Minn.*, No. 18-cv-

other pending petitions, this Court's intervention is necessary to clarify that it meant what it said in *Janus*: that unions may not take money from employees without their affirmative consent.

II. *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver to prove affirmative consent.

This Court in *Janus* explained that payments to a union could be deducted from a non-member's wages only if that employee "affirmatively consents" to pay:

> Neither an agency fee *nor any other payment* to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the *employee* affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted) (emphasis added).

The courts below claimed that the holding in *Janus* is limited in application to agency fee payers. App. 3, 19 n.9. But this Court was clear that it required all "employees" to "freely give[ ]" their "affirmative[ ] consent" to "any . . . payment" made to a union. *Id.* And

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1686 (D. Minn.); *Prokes v. AFSCME 5*, No. 0:18-cv-2384 (D. Minn.).

any waiver of an employee's First Amendment right to pay nothing to the union must be "shown by 'clear and compelling' evidence." *Id.*

Certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972). Finally, this Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Grossman's case, she could not have waived her First Amendment right to not join or pay a union when she signed the union agreement at issue. First, neither the Union nor her employer informed her of her right not to pay a union because, at the time she signed her union membership application, this Court had not yet issued its decision in *Janus*. Second, neither the Union nor her employer informed her of her right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Grossman had no choice but to pay the Union and could not have voluntarily, knowingly, or intelligently waived her First Amendment right.

Because a court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.,* 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, "[c]ourts indulge every reasonable presumption

against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

The union application Grossman signed did not provide a clear and compelling waiver of her First Amendment right not to join or pay a union because it did not expressly state that she had a constitutional right not to pay a union and because it did not expressly state that she was waiving that right.

Nor can the Union rely on the extant case law at the time Grossman signed her union authorization. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), this Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

By this rule, the Union's liability for dues paid by Grossman extends backward before *Janus*, limited only, if at all, by a possible statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir.

1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to hold Grossman to her union authorization or to keep the monies it seized from her wages before this Court put an end to this unconstitutional practice. Grossman is entitled to a refund of these dues.

After the decision in *Janus*, the Union maintained that Grossman could only end her dues deduction during an arbitrary window of the Union's choice, despite Grossman's repeated requests to stop the dues deduction from her paycheck. The union dues authorization application signed by Grossman before *Janus* cannot meet the standards set forth for waiving a constitutional right, as required in *Janus*. 138 S. Ct. at 2484. Therefore, the Union cannot hold employees like Grossman to a time window to withdraw their union membership based on these invalid authorizations.

Since being informed of her constitutional rights by the *Janus* decision, Grossman did not sign any additional union authorization application. Therefore, she has never knowingly waived her constitutional right to pay nothing to the union and has never given the union the "affirmative consent" required by the *Janus* decision.

This Court should grant certiorari in this case to ensure that lower courts are properly applying its decision in *Janus* to employees like Grossman, who never knowingly waived her right to pay nothing to the Union.

III. This Court should resolve the confusion among the circuits and hold that Unions cannot moot claims through gamesmanship.

The District Court below held that Grossman was not entitled to a ruling on her claim regarding the escape window because, once she was allowed to stop paying dues, her prospective claims for relief were moot. The Ninth Circuit affirmed this holding in a brief, unpublished opinion, despite the fact that the Courts of Appeals decisions on mootness have not been consistent on that issue. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *compare Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 957 (10th Cir. 2021); *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019). Moreover, it was wrong as to Grossman, since her damages claim means there remains a live controversy regarding the window period.

Grossman has a live claim for damages for the dues collected from her that have never been returned. Therefore, her claim cannot be moot. Grossman's requested declaratory relief is simply a predicate of the damages claim: in order to determine whether Grossman is entitled to monetary damages, a court necessarily must determine whether the Union's policy violates *Janus*.

Moreover, even the partial return of some or all of the relevant dues, and the expiration or the release of the window requirement should not moot the case.

Unions across the country have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees that challenge their practices. For those like Petitioner who do sue, unions consistently mail them checks in an attempt to avoid constitutional scrutiny. In a pending case in the Ninth Circuit, the Teamsters signed an employee up for a *four-year* window, and then only relented and let her stop paying dues, sending her a refund check months after the case was fully briefed and pending in the Court of Appeals. *See O'Callaghan v. Teamsters*, Ninth Circuit Case No. 19-56271. These instances of gamesmanship are not isolated. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice their policy required). This Court should not allow unions to avoid judicial review by picking off employees one by one. A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Yet that is precisely what the court below allowed.

By contrast, some courts have recognized that the relevant exceptions to mootness apply. In *Belgau* the Court held that "[b]ecause Washington continued to deduct union dues until the one-year terms expired, other persons similarly situated could be subjected to the same conduct. For these reasons, we exercise jurisdiction over Employees' claim against Washington."

975 F.3d at 949-50. This is precisely the scenario faced by workers around the country.

The Ninth Circuit's opinion in *Belgau* followed its earlier unpublished opinion to the same effect in *Fisk*:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk, 759 F. App'x at 633. *Fisk* and *Belgau* recognized that claims like Petitioner's would never be addressed by the court if the Union were allowed to moot them in this way.

But unions are doing everything in their power to prevent this Court from ruling on the simple question presented as the first issue in this Petition: Can a union trap government workers into paying dues if they never provided the consent required by *Janus*? Such

avoidance tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), this Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted dues to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. In *Knox*, the Court ruled on the merits of the issue because defendants "continue[] to defend the legality" of their practice. *Knox*, 567 U.S. at 307. All the defendants in this case also continue to defend the legality of trapping government workers into paying dues without consent. Because both the government defendants and the Union "continue[] to

defend the legality" of their practice, the Union's claim for mootness should be denied. *Knox*, 567 U.S. at 307.

A district court in New Jersey properly rejected this same mootness strategy. Again, the union in that case had attempted to moot claims about their escape window policies by ending deductions and sending a check. The court explained its reasoning:

> In short, Defendants' argument is seemingly that unions can: compel membership for up-to 11 months and 20 days from those wishing to resign, collect fees that it may not be entitled to, and avoid court intervention by paying off only those who file lawsuits. But the Third Circuit warned against nearly this exact scenario in [*Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020)]. As noted above, this Court must be "skeptical of a claim of mootness when a defendant . . . assures [the Court] that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along." *Hartnett*, 963 F.3d at 306. Indeed, the Court must focus "on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189). And when Defendants make these mootness arguments, they bear a "heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (cleaned up).

Lutter v. JNESO, No. 19-13478 (RMB/KMW), 2020 U.S. Dist. LEXIS 223559, at *13 (D.N.J. Nov. 30, 2020). The court in *Lutter,* addressing the same basic facts, rejected the mootness argument because "[t]he

WDEA's resignation restrictions are still enforced today, and Defendants seemingly maintain that the statute is constitutional." *Id.* at *15.

Lutter went on to explain that "the WDEA's resignation window may still affect Plaintiff. If Plaintiff desires union representation in the future—or, possibly, the present—the WDEA's restrictive resignation scheme is undoubtedly a factor in weighing the pros and cons of union membership." *Id.* The same reasoning applies here. It is possible that Grossman could have some need arise for union membership in the future. It is also possible that the Union could use coercive, deceitful, or incomplete information to lure her into membership again.

These principles of law are not novel or unique to post-*Janus* cases: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125 (1974), this Court recognized that "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. Nor was Jane Roe forced to submit an affidavit of her intention to get pregnant again. The Court explained in *Super Tire* that, even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 125. The escape window that Peti-

tioner was subjected to is a policy of the State of Hawaii, embodied in an agreement it negotiated with the Union and authorized by statute. This policy continues to impact present interests because Respondents continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for declaratory relief. This Court should grant certiorari in this case and declare that the mandated "limited escape window" in Hawaii Act 7 unconstitutionally violates its decision in *Janus*.

While the panel opinion did not grapple with these issues, the district court below attempted to distinguish *Fisk* (*Belgau* had not been decided yet) and other cases Petitioner cited on the basis that the cases were putative class actions. App. 31-32. This is not true of all the relevant cases—neither *Lutter* nor *Super Tire* mention a class, for instance. But even in those cases that were class actions, the proposed class was not the basis for the ruling because "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016). The basis for the ruling was the inherent transience of the claim. For example, in *Roe,* this Court was not concerned with the uncertified class; instead, it focused on the length of pregnancy:

> [T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.

410 U.S. at 125. A constitutional violation cannot avoid court scrutiny simply because the relevant time

period will run out before the appellate process is complete.

It was precisely this concern with the transience of the claim that guided the court in *Fisk*: "*although no class has been certified* and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." 759 F.App'x at 633 (emphasis added). *Belgau*, likewise, dealt with "an inherently transitory, pre-certification class-action claim" that justified an exception to usual mootness principles." 975 F.3d at 949. In both cases, the Ninth Circuit relied on its previous decision in *Johnson v. Rancho Santiago Community College District*, which had held that even a three-year duration is "too short to allow for full judicial review." 623 F.3d 1011, 1019 (9th Cir. 2010). Grossman's declaratory relief claim lasts only one year at most. The Ninth Circuit's theory that other "escape window" cases are to be distinguished regarding mootness because they pled putative class membership is a misreading of the clear language of those cases.

Moreover, in *Knox*, there was a class, but that was not the basis for this Court's ruling. Indeed, the union in *Knox* had offered refunds to the *entire class*, so there were no absent class members who hadn't received the money. Instead, this Court explained that the union's refund was irrelevant because "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). This is precisely the scenario Petitioner urges this Court to avoid.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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